91-65

Supreme Court, U.S.
FILED
JUL 3 1991
OFFICE OF THE CLERK

CASE NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CLARENCE LEE ROY COMBS;	)
	)
Petitioner,	)
	)
vs.	)
	)
ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation; AMALGAMATED LOCAL 887-UAW, an unincorporated labor union; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), an unincorporated labor union, and DOES 1 through 100, inclusive,	)
	)
Defendants.	)

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CLARENCE LEE ROY COMBS, Appearing Pro Se

I am my own attorney of record and am appearing pro se. My address and telephone number for all purposes are:

Clarence Lee Roy Combs
38851 Juniper Tree Road
Palmdale, California 93551
(805) 273-1490

QUESTIONS PRESENTED

(1) Whether Article V, @18(b) in the collective bargaining agreement ("Master Agreement") of Rockwell and the UAW (which confines remedial relief, regardless of the time period suffered or actual monetary loss involved, to a period not exceeding 30 days prior to the date of filing the grievance), excuses exhaustion of contractual remedies under petitioner's facts on the basis of inadequacy of remedy?

(2) Whether a dismissal pursuant to Federal Rules of Civil Procedure ("FRCP") @11, based on immaterial misrepresentation of fact under FRCP 30(e), is excessive and constitutes an abuse of discretion by the district judge, especially when discovery reveals that the petitioner was wrongfully deprived of hundreds of thousands of dollars in back pay due to arbitrary and capricious conduct by both the company and union

representatives?

(3) Whether said dismissal violates the procedural and substantive due process requirements of the 5th and 14th Amendments of the U.S. Constitution?

(4) Whether the further imposition of joint and several liability for double costs and attorney's fees, again pursuant to FRCP 11, is excessive, constituting an abuse of discretion by the United States Court of Appeals, Ninth Circuit, and is a further deprivation of procedural and substantive due process under the Fourteenth Amendment?

(5) Assuming arguendo that Art. V, @18(b) does not render contractual relief inadequate, whether equitable tolling and/or equitable estoppel would apply to toll the Statute of Limitations and prevent the action from being barred?

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	4
REPORTED CASE	8
JURISDICTIONAL BASIS	8
PERTINENT PROVISIONS	8
STATEMENT OF THE CASE	12
ARGUMENT	18
APPENDIX	41

TABLE OF AUTHORITIES

CASE	PAGES
Atkins v. Union Pac. Railroad 685 F.2d 1146 (9th Cir. 1982).	37
Clayton v. International Union, UAW 451 U.S. 679 (1980).	21
Del Costello v. Internat. Broth. of Teamsters 462 U.S. 679, 103 S.Ct. 2281, 76 L.ed.2d 476 (1983).	38
Eichman v. Fotomat Corporation 871 F.2d 784 (9th Cir. 1989).	31
Fjelstad v. Am. Honda Motor Co. 762 F.2d 1334 (9th Cir. 1985).	30
Glus v. Brooklyn Electric Dist. Terminal 359 U.S. 231 (1959).	37
Halaco Eng. Co. v. Costle 843 F.2d 376 (9th Cir. 1988).	30
Hammond Packing Co. v. Arkansas 212 U.S. 322, 29 S.Ct. 370,	33

53 L.ed. 530 (1909).

In Re Griffiths 27

413 U.S. 717, 93 S.Ct. 2851,

37 L.ed.2d 910 (1973).

Malone v. U.S. Postal Service 26

833 F.2d 128 (9th Cir. 1987).

Phoceene Sous-Marine, S.A. v. 33

U.S. Phosmarine, Inc.

682 F.2d 802 (9th Cir. 1982).

Raiford v. Pounds 30

640 F.2d 944 (9th Cir. 1981).

Retana v. Apartment, Motel & El. 21

Op. U., Loc. No. 14

453 F.2d 1018 (9th Cir. 1972).

Scoggins v. Boeing Co., Inc. 21

742 F.2d 1225 (9th Cir. 1984).

Stitt v. Williams 37

919 F.2d. 1146 (9th Cir. 1982.

Truax v. Raich 27

239 U.S. 33, 36 S.Ct. 7, 60 L.ed.

131 (1915).

Vaca v. Sipes 20

386 U.S. 171, 87 S.Ct. 903,

17 L.ed.2d 842 (1967).

Wyle v. R.J. Reynolds Industries 30

709 F.2d 585 (9th Cir. 1983).

U. S. CONSTITUTIONAL AMENDMENTS

Fifth Amendment. 2,8,9

Fourteenth Amendment. 2,8,9,32

STATUTES

Labor-Management Reporting & 39

Disclosure Act of 1959

National Labor Relations Act

29 U.S.C. @159(a). 14,37

29 U.S.C. @1331. 8

RULES

FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. 8,9,10,27,29,31,39

Rule 26(g). 27,29

Rule 30(e). 10,11,39

Rule 60. 16

LOCAL RULES- U.S. DISTRICT COURT- CENTRAL

DISTRICT (CALIFORNIA)

Rule 7.16. 16

REPORTED CASE

The Ninth Circuit decision which this petition seeks review of is reported at 927 F.2d 486 (9th Cir. 1991); 1991 U.S. App. Lexis 3256 and 18 Fed. R. Serv.3d 1445 (1991). The District Court is unreported.

JURISDICTIONAL BASIS

The date of entry of judgment of the Ninth Circuit U.S. Court of Appeals is March 4, 1991. However, a Petition for Rehearing and Motion to Amend Petition were timely filed on March 12, 1991 and March 14, 1991, respectively, and the denial of both actions was filed on April 5, 1991.

The judgment of the Ninth Circuit is reviewable by this Court pursuant to 29 U.S.C. @1331 involving federal questions.

PERTINENT PROVISIONS

Pertinent provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution and Rule 11 of

the Federal Rules of Civil Procedure. Their pertinent texts are:

(1) Fifth Amendment of the Constitution of the United States:

"No person shall ... be deprived of life, liberty or property, without due process of law...".

(2) Fourteenth Amendment of the Constitution of the United States:

"... No state shall ... deprive any person of life, liberty, or property, without due process of law...".

(3) Rule 11, Federal Rules of Civil Procedure:

"... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, and

that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorneys fee."

(4) Rule 30(e) of the Federal Rules of Civil Procedure:

"When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and

reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part."

STATEMENT OF THE CASE

Petitioner has been a Rockwell aerospace employee in California since March 22, 1962 and for most of that time (and all relevant times herein) has been a union member. The pertinent time period herein is from August of 1969 until August of 1977, wherein petitioner was on layoff. Shortly after his return to work in 1977, he was told by a company rep that in the early 1970's workers had been transferred from Florida to California and occupied positions for which petitioner was qualified. If true, this would be in direct contravention of the Master Agreement, which states that all qualified workers are to be chronologically recalled in terms of their years of service with the company ("seniority"), and petitioner should have been recalled ahead of many of these transferees.

Discovery later revealed that, although

the point of origin for these workers could not be traced, there were indeed workers at the California plant during petitioner's layoff with less seniority than he employed at jobs for which he was qualified. Regardless of where they originally came from, their being used at these jobs ahead of him violated the terms of the Master Agreement.

Petitioner submitted three grievances on the matter, the paperwork for one of which was misplaced by Local 887. Although a possible issue of timeliness was initially present re the grievances, this was waived by Rockwell, the UAW and Local 887 and never asserted as a defense at any stage of the contractual or judicial proceedings.

Throughout the course of the grievances, petitioner was informed by both Local 887 and the company that his seniority date was recognized back to 1962 but upon being

"broken back" from a company position in June of 1985 into the union work force, he was informed it was only recognized back to 1980. Petitioner then wrote three letters to the company Personnel Director in 1985, 1987 and 1988, respectively. On the first two occasions, he was told via telephone by that office that the company was investigating the matter, which, pursuant to 29 USC 159(a), they are authorized to do independent of the collective bargaining process.

When petitioner heard nothing from that office, he filed suit in the United States District Court, Central District, on June 23, 1988. Jurisdiction was conferred by 29 USC @185(a) of the Labor Management Relations Act of 1947 re breach of the collective bargaining agreement by Rockwell and breach of duty of fair representation by the union defendants, the Employee

Retirement Income Security Act of 1974 re the administration of welfare benefit plans pursuant to 29 USC ee 1002 et al..

On September 18, 1989, Judge Terry J. Hatter granted the motion to dismiss of all defendants on the grounds that petitioner and his attorney falsified deposition testimony by stating in the verification that petitioner had read the deposition before signing when he in fact did not. Because the dismissal was granted, the judge did not address the merits of the joint motions for summary judgment, although he intimated that they would have been granted on grounds of the bar of the Statute of Limitations. The order was entered on behalf of Rockwell on September 21, 1989 and an Amended Order on the part of the union on December 11, 1989.

On October 30, 1989, the Judge denied petitioner's Motion For Relief from Judgment

or Order (FRCP 60) or, in the Alternative, Motion for Reconsideration of the Dismissal of Plaintiff's Lawsuit (Local Rule 7.16). Said order was entered on November 17, 1989 on behalf of both defendants.

Appeal was taken to the Ninth Circuit for the dismissals on October 23, 1989 (89-56212) and for the denial of relief on December 14, 1989 (90-55118). The jurisdictional basis was Federal Rule of Appellate Procedure 4(a)(3). On February 22, 1990, during a telephone conference between parties' counsel and conference attorney Juliet L. Gee, the docket nos. were consolidated and the prebriefing schedule of 90-55118 adopted for both matters.

In a written decision rendered and entered March 4, 1991, the Ninth Circuit both rubber-stamped the court below and then imposed double costs and attorney's fees jointly and severally against petitioner and

his counsel, Mike Pincher, on the grounds that the appeal was frivolous. Petitioner was also described, in the most conclusionary of fashions, as demonstrating "mendacity", which he vociferously denies. It is his honesty that created the problem and not his dishonesty and he is nothing less than repulsed by the court's characterization and slander to his good name that is contrary to the evidence actually presented in the case.

A Petition for Rehearing was filed on March 12, 1991 and a Motion to Amend said Petition on March 14, 1991. Said petition and motion were denied and entered by the Ninth Circuit on April 5, 1991.

The decision rendered on March 4, 1991 called for the submission of attorney's fees and costs by the defendants. Petitioner submitted oppositions to both and the court has yet to rule as of the preparation of

this petition. In order to be timely, however, petitioner has registered his appeal based on the imposition of attorney's fees and costs in any fashion whatsoever, and since all defendants have failed to abide by the rules of the Ninth Circuit, they should be denied these awards on those as well as other grounds to be expounded upon in the argument below.

ARGUMENT

The upholding of the District Court dismissal allows the Ninth Circuit to avoid very pertinent issues to both this case and organized labor law generally. It is an inexcuseable bail out on the part of the court, however.

Art. V, @18(b) of the Master Agreement states:

> "In no event shall any decision or award upon any problem or grievance filed by any employee or the Union

> under Article V or VI be made effective for any period beyond thirty (30) calendar days prior to the date such problem was first recorded in accordance with Article V or VI."

Re the subject-matter jurisdiction of the collective bargaining process via Art. V, @18(b), a strict adherence to its provisions eliminates petitioner from effective remedies before he begins. While on layoff, there is no way he could reasonably learn that he should have been recalled sometime in the early 1970's. Evidence showed that the union and company newspapers are denied him while on layoff.

Yet, since he did not return until 1977, he experienced from three to five years of lost backpay, resulting in hundreds of thousands of dollars in damages from lost backpay and retirement benefits. By confining him to a 30 day remedy from the

date of filing, the defendants make a mockery of petitioner's damages.

This emasculation of petitioner's contractual rights is contrary to this court's position in Vaca v. Sipes, 386 U.S. 171, 186, 87 S.Ct. 90, 317 L.ed.2d 842 (1967), wherein it was stated:

> "We cannot believe that Congress, in conferring upon employers and unions the power to establish grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such breaches." (Emphasis added).

It is submitted that the inadequacy of

remedy is patently obvious and exhaustion of remedies may be excused at the discretion of the trial judge and the failure to do so, as here, constitutes a blatant abuse of discretion. Clayton v. International Union, UAW, 451 U.S. 679, 692 (1980); Scoggins v. Boeing Co., Inc., 742 F.2d 1225, 1229 (9th Cir. 1984); Retana v. Apartment, Motel & El. Op. U., Loc. No. 14, 453 F.2d 1018, 1025 (9th Cir. 1972).

It is also submitted that this provision should be viewed as a definition of the parameters of the subject-matter jurisdiction of the collective bargaining process, an acknowledgement that the process itself is insufficiently equipped to handle expansive matters such as this and therefore any exhaustion of contractual remedies requirement is a fortiori excused.

This brings us to the focal point of this petition. Petitioner point-blanketly denies

any fraud or mendacity in his signing the declaration verifications and the courts' conclusions below totally ignore the following: (1) although petitioner did not actually read the transcript in advance, any changes to be made were fully discussed by he and his counsel on the telephone before the declaration verifications for the deposition sessions (there were four of them) were signed, (2) all of the changes were made to reflect facts actually on record either as other deposition testimony or as written exhibits to the deposition (or submitted as part of the district court's Early Meeting of Counsel),

(3) at the time the verification forms were signed, petitioner mistakenly thought these forms were actually authorization forms permitting counsel to make the changes in his own words rather than petitioner's, so there could not have been any conscious

design to deceive, (4) any reading requirement has a context only in terms of being read in the transcriber's office per FRCP 30(e), a context only having relevance when the reporter has possession of the transcript instead of petitioner's counsel, whereas in this case it was stipulated to by all counsel that the reporter would be relieved of all statutory obligations and that the original transcript(s) would be sent to Mike Pincher, petitioner's counsel. It was also stipulated that a failure to sign would be an adoption of the content therein, certainly mandating an alteration if one was felt necessary,

(5) petitioner at the time in question had to travel some 130 miles or more round trip to work and back home and had little to no time to read the transcript, which would have taken months and should have been unnecessary under the circumstances, (6)

only 9 of the 36 changes made in the over 700 page deposition had language even stating in the verification that petitioner had read the transcript,

(7) whether petitioner read it or not is really immaterial- what is material is whether he understood the content or not and agreed with it and he clearly did by the time the changes had been approved, (8) FRCP 11 allows for sanctions to be imposed in the first instance--that, if anything, is what should have been done in the form of attorney's fees or other monetary or even evidentiary sanctions as oppposed to an outright dismissal,

(9) for the Ninth Circuit to impose double attorney's fees and costs, the appeal had to be frivolous. For petitioner to feel he was wrongly treated and vilified by the District Court and yet have his appeal treated as frivolous when defendants'

actions cost him hundreds of thousands of dollars in lost backpay and retirement benefits is an absurdity, outrage to law, ethics and humanity and an absolute, unequivocal disgrace. With these kind of damages involved, he would have had his sanity questioned if he had not pursued it to its conclusion. The damages he was made to suffer dictated that he appeal the matter, and how an appeal based on this factual context can be considered frivolous is beyond all that is reasonable.

(10) the assertion that changes can only be made to correct transcription errors contradicts instructions given to petitioner as a witness by defendants' during the deposition sessions and standard practice by attorneys generally and is logically absurd, implying that changes cannot be made even if information honestly but erroneously given appears in the transcript, and (11) the

highly conclusionary manner in which the District Court and Ninth Circuit ignored the evidence and accused petitioner of "mendacity" and his counsel of "combined fraud and incompetence" in the case is defamatory to them and suggests that these courts are more interested in clearing federal calendars than in adjudicating cases on their merits (although the Ninth Circuit has acknowledged a federal public policy concern to adjudicate cases on their merits in Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987) and this posture is unforgiveable.

There are three particular implications to the lower courts' decisions that petitioner finds particularly offensive. First, both decisions are, in effect, saying that it is more egregious for a deponent to say he has read his testimony when he has not (which petitioner did not even

understand himself to be saying), even though he understood what he had said and then what had to be changed after consultation with his attorney, than it is for a company and union to wrongfully and knowingly deprive a worker of his statutorily defined, Constitutionally-protected "fundamental right" to lawful wages, earned retirement pay and gainful employment, herein amounting to hundreds of thousands of dollars. In Re Griffiths (1973) 413 U.S. 717, 720, 93 S.Ct. 2851, 37 L.ed.2d 910; Truax v. Raich (1915) 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.ed. 131.

And this, when other alternative measures under FRCP 11 and 26(g) are available to protect any offense to the "integrity" of the judicial system and still preserve petitioner's judicial and public policy right to an adjudication of his case on the merits. The moral outrage of defendants'

acts pale the petitioner's.

These acts include: (1) Petitioner was told once by Local 887 officials and once by company management that his seniority was adjusted back to 1962, only to be contradicted later by the company, (2) in his second grievance, it was clearly indicated he should have been recalled to Downey, California rather than Palmdale, yet the decision addressed his failure to check a box for recall to Palmdale while signing layoff papers, which is a compound error anyway because there was no Palmdale box to check.

(3) the decision also said petitioner failed to request seniority hookup to transfer seniority credit from Palmdale to Downey, which he had no notice of because said requirement was imposed while he was on layoff. Still further, the Master Agreement provision allowing such coupling imposed no

such requirement of a formal request by affected workers and to impose such is an amendment or supplement to that document which required a vote of union membership pursuant to the UAW Constitution and that never happened, and,

(4) petitioner was never given notice of his grievance denial by Local 887 or the company except on his own initiative, when he cornered a company official after tiring of waiting and also being told that his grievance was still pending. Only then was he shown his denial paper and this was about a year after its actual rendition. The Ninth Circuit language implies notice was given him in writing by the union and company in due course at their own initiative, which is a falsehood.

It is interesting to note that dismissal is not even mentioned as an alternative under either Rule 11 or 26(g). Although

case law has allowed dismissal for falsification of evidence, that has concerned actual alteration of an evidentiary document such as in Halaco Eng. Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988) and multiple discovery delays and incomplete interrogatory answers as in Fjelstad v. Am. Honda Motor Co., 762 F.2d 1334, 1338 (9th Cir. 1985), which were both reversed on other grounds. None of the above occurred here.

The Ninth Circuit itself has even stated that deception, if any, must involve matters in controversy to warrant dismissal. Wyle v. R.J. Reynolds Industries, 709 F.2d 585, 589 (9th Cir. 1983); Raiford v. Pounds, 640 F.2d 944, 945 (9th Cir. 1981). In this case, the matters in controversy were clarified by the changes in conformity with documentary evidence already on file or other deposition testimony. That is not

deception. The sole deception, if any, was in petitioner stating he had read the deposition before signing the verification. That is not a matter in controversy or material to the resolution of the facts in controversy.

The Ninth Circuit has even abandoned its own Rule 11 yardstick for determining whether sanctions themselves are in order. In Eichman v. Fotomat Corporation, 871 F.2d 784 (9th Cir. 1989), 1989 U.S. App. Lexis 3262, [p.19], 1989-1 Trade Cas. (CCH), it said:

> "A Court must impose sanctions if competent counsel could not form a reasonable belief that the pleading or other paper is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law ... It follows that sanctions are inappropriate where

> reasonable and competent attorneys could disgree over the existence of a good faith argument." (Emphasis added).

Petitioner submits that such a good faith argument exists in this instance.

The dismissal and double costs and attorney's fees imposed by the respective courts below are so harsh as to support the proposition that the case was removed to both clear the judicial dockets of congestion regardless of the merits and give a false sense to the public that the legal system is doing its best to police its own. To clear dockets in such an arbitrary fashion violates Fourteenth Amendment procedural due process and to use petitioner's innocent conduct as a scapegoat for a public front is inexcuseable and unforgiveable and must be dealt with severely. A commitment to policing its own

does not justify a Salem witch hunt.

Although there is an inherent power to dismiss for willful deception and engaging in conduct utterly inconsistent with the orderly administration of justice (Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir. 1982)), this court has acknowledged that the requirements of due process limit a court's exercise of its inherent power. Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349-54, 29 S.Ct. 370, 379-81, 53 L.ed. 530 (1909). This same thinking must also be applied, a fortiori, to an instance when double costs and attorney's fees are further imposed on the premise that petitioner's contesting of the extremity of the district court's action was frivolous.

Secondly, the implication is that no longer how sincere the appeal, there is an imminent danger of its being ruled

frivolous. When the day comes that someone who has been demonstrably damaged monetarily like petitioner has has to worry about his appeal being regarded as frivolous when a genuine dispute as to his conduct arises, that is the day when the legal system must be declared unfit to serve this society. Public policy demands this be redressed to prevent a "chilling effect" on meritorious lawsuits everywhere. Our courts cannot be allowed to be reduced to an instrument of pettiness and celebration of form over substance.

Thirdly, to allow the Ninth Circuit decision to stand would be to permit the courts to defame litigants and their counsel unnecessarily and without legal, moral or ethical justification by making conclusionary statements totally contradictory to the evidence. If the evidence had been considered in its

totality, petitioner would have been found by anyone of normal intelligence to have thought he initially had given correct responses at the time he made them, would not have changed them on his own but saw their error after consultation with his counsel and authorized them to be changed by counsel in the attorney's own words after understanding the substance of the changes and agreeing with them so that they could be expressed in proper legal fashion. It is submitted here that this judicial practice of cheap-shotting be curbed here and now with abject apologies directed by the Ninth Circuit toward petitioner and his counsel.

The absurdity of this situation is made patent when it is considered that if petitioner were truly guilty of "mendacity", he would have remained mendacious and simply stated that he had read the deposition transcript and made the changes entirely

independently, simply carte-blanchely rubber-stamping his attorney's actions for the sake of convenience to avoid any possibility of controversy. He would have continued the lie to cover his tracks. He did not because he was being honest on both occasions. By being honest, he did the inconvenient thing and opened the door for the judicial abuse that followed. Petitioner pointed out this fact to the courts but was summarily ignored.

This is the classic case of an honorable man being treated in an outrageously dishonorable fashion. The fact that most changes simply conform to the hard, documentary evidence already on file in the case seems to be of no consequence whatsoever.

There are serious equitable considerations at issue here, too, in the form of equitable estoppel and equitable

tolling re application of the Statute of Limitations. Equitable estoppel is invoked in that the assurances of the union and company of having petitioner's seniority credited back to 1962 and the two promises that the company was making an independent investigation as authorized under 29 USC 159(a) lulled him to sleep. This principle has long been recognized by this court, as in Glus v. Brooklyn Electric District Terminal, 359 U.S. 231, 232 & 233 (1959).

The Ninth Circuit has more recently enunciated this posture in Stitt v. Williams, 919 F.2d 526 (9th Cir. 1990); 1990 U.S. App. Lexis 19951, p.13, and therein cited the previous case of Atkins v. Union Pac. Railroad, 685 F.2d 1146, 1149 (9th Cir. 1982).

Equitable tolling may also be involved in that this union (and unions nationwide for that matter re their own Constitutions) has

made a requirement of exhausting certain procedural steps contained therein before resort to the judicial system can be made and that the existence of the very guideline for this process, the UAW Constitution, is concealed from the membership. Ninth Circuit case law seemingly supports the invocation of this principle in this context. Stitt, supra, at Lexis p. 10.

Likewise, when the company undertakes an investigation, it should follow through. This is consistent with the Congressional intent of promoting in-house resolution of grievances as espoused in Del Costello v. International Broth. of Teamsters, 462 U.S. 151, 153&154, 103 S.Ct. 2281, 76 L.ed.2d 476 (1983).

A corollary issue arises of whether or not a union Constitution should be given out to the membership as a matter of course consistent with the union's fiduciary

obligations pursuant to the Labor-Management Reporting and Disclosure Act of 1959, Declaration of Findings, Purposes and Policy at @@ 2(a) and (b) and Title V-SAFEGUARDS FOR LABOR ORGANIZATIONS of said Act (29 U.S.C. 501). For the union to allow and perpetuate the lingering of this document in obscurity on the one hand and yet hold the membership responsible for its precepts is in apparent contradiction to this obligation.

In sum, both courts below have so far departed from the reasonable parameters of Rule 11 and Rule 30(e) in the severity of the sanctions imposed as to call for an exercise of this court's power of supervision, to the degree of also involving serious Constitutional questions in their wake, providing a compelling reason for review under Rule 10(a) of this court. The Ninth Circuit has sanctioned petitioner and

his counsel in a manner inconsistent with the precepts of its own past rulings, invoking review under Rule 10(b).

Matters of federal public policy and general judicial policy as to the standards of conduct of labor unions and management toward the employee are at issue herein and collective bargaining procedures have been conducted contrary to enunciated policy of this court, creating a disputed federal question, calling for review under Rule 10(c) of this Court.

DATED: July 1, 1991.

APPENDIX

INDEX

	PAGE
USCA Denial Of Petition For Rehearing And Motion To Amend Petition.	42
USCA Summary and Opinion.	44
USDC Amended Order Re Union Defendants.	51
USDC Order Re Rockwell International Corporation.	54

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE LEE ROY COMBS	)	No. 89-56212
Plaintiff-Appellant,	)	D.C. No. CV-88
v.	)	3614-TJH
ROCKWELL INTERNATIONAL	)	ORDER
CORPORATION; AMALGAMATED	)	
LOCAL 88-UAW,	)	ENTERED APR 5,
Defendant-Appellees.	)	1991

CLARENCE LEE ROY COMBS	)	No. 90-55118
Plaintiff-Appellant,	)	D.C. No. CV-
ROCKWELL INTERNATIONAL	)	88-3614-TJH
CORPORATION; AMALGAMATED	)	
LOCAL 887-UAW;	)	
INTERNATIONAL UNION;	)	
UNITED AUTOMOBILE;	)	
AEROSPACE & AGRICULTURAL	)	
IMPLEMENT WORKERS OF	)	
AMERICA,	)	
Defendant-Appellees.	)	

Before: GOODWIN, HUG and FARRIS, Circuit Judges.

Appellant's petition for rehearing and motion to amend the petition for rehearing are denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARENCE LEE ROY COMBS,
Plaintiff-Appellant,

v.

ROCKWELL INTERNATIONAL CORPORATION; AMALGAMATED LOCAL 887-UAW,
Defendant-Appellees.

No. 89-56212
D.C. No
CV-88-3614-TJH

CLARENCE LEE ROY COMBS,
Plaintiff-Appellee,

v.

ROCKWELL INTERNATIONAL CORPORATION; AMALGAMATED LOCAL 887-UAW; INTERNATIONAL UNION; UNITED AUTOMOBILE; AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Defendant-Appellees.

No. 90-55118
D.C. No.
CV-88-3614-TJH
OPINION:

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted
February 6, 1991—Pasadena, California

Filed March 4, 1991

Before: Alfred T. Goodwin, Procter Hug, Jr. and
Jerome Farris, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Courts and Procedure

Affirming a district court judgment dismissing an action, the court of appeals held that falsifying deposition transcripts was a proper ground for the imposition of the sanction of dismissal.

Appellant Clarence Lee Roy Combs was employed from 1962 until 1969 by Rockwell International Corporation under a collective bargaining agreement entitling him to retain his seniority and recall rights for five years. Combs was not recalled after 1969 and his rights expired in 1974. After Rockwell rehired Combs in 1977, he discovered that Rockwell had violated his seniority and recall rights by hiring other workers before he was rehired. Nine years after rejection of his initial grievance by Rockwell and the union, Combs filed an action in district court alleging various claims. Rockwell and the union deposed Combs. The original transcript was sent to Combs' attorney so that Combs could review it and make necessary changes to correct transcribing errors. Combs gave his counsel permission to alter any of his responses. Among the most striking changes were several reversals of Combs' answers concerning issues of central importance in an upcoming summary judgment hearing. Despite his sworn statement to the contrary, Combs never reviewed either the original or the altered deposition transcripts. The district court granted a motion to dismiss Combs' action as the appropriate sanction for his misconduct.

[1] Dismissal is an appropriate sanction for falsifying a deposition. Fed. R. Civ. P. 11, as well as the court's inherent powers, can be called upon to redress such mendacity. [2]

Combs authorized counsel to alter his deposition in material respects. He signed the revised deposition and swore, under penalty of perjury, that he had reviewed the transcript and had himself made the changes. This conduct was in direct violation of Fed. R. Civ. P. 30(e). [3] Combs, whether or not in collusion with counsel, thus attempted to deceive the district court on material matters before it. Falsifying evidence is grounds for the imposition of the sanction of dismissal. [4] Here, the mendacity of the client and the combined fraud and incompetence of his counsel were so egregious that there was no need to reach the merits of the action for summary judgment. [5] Because Combs' contentions on appeal were wholly without merit, double costs and attorneys' fees were assessed for filing a frivolous appeal.

COUNSEL

Mike Pincher, Palmdale, California, for the plaintiff-appellant.

Paul W. Cane, Jr., Paul, Hastings, Janofsky & Walker, Los Angeles, California, for the defendant-appellee.

Michael R. Feinberg, Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, California, for the defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

Clarence Combs appeals the dismissal of his damages action against Rockwell International Corp.; the United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); and UAW's chartered affiliate Amalgamated Local 887-UAW (Local 887). We affirm.

From 1962 until 1969, Combs was employed by Rockwell. Pursuant to Article XI, Section 17(g) of the collective bargaining agreement between Rockwell and the UAW (Combs' union), Combs was entitled to retain his seniority and recall rights for five years. He was not recalled after 1969, and his rights expired in 1974.

In 1977, Rockwell rehired Combs. Combs then discovered information that led him to conclude that Rockwell had violated his seniority and recall rights by hiring other workers before he was rehired. In 1978, Combs filed a grievance with Rockwell and Local 887. In 1979, Rockwell and Local 887 notified Combs in writing that his grievance had been denied on the merits. Under the UAW's Constitution, actions by Local 887 could be appealed, first to the Local Union's bargaining unit (i.e. Rockwell), then to the Local Union itself, then to the UAW's Executive Board, and finally to the UAW's Convention Appeals Committee or the Public Review Board. Combs declined to exercise his right of internal appeal.

Nine years after the rejection of his initial grievance, Combs filed this action against Rockwell, Local 887, and the UAW. His claims included: breach of the collective bargaining agreement by Rockwell; breach of fiduciary duty in violation of 29 U.S.C. Section § 1001 *et seq.* ("ERISA") by Rockwell; breach of the duty of fair representation by Local 887 and the UAW; and — alleged against all defendants — intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent misrepresentation, and negligence.

In the fall of 1988, Rockwell and the UAW deposed Combs. At the conclusion of the deposition, the parties stipulated that the original transcript would be sent to Combs' attorney in order to have Combs review it and make necessary changes to correct transcribing errors. Although Combs said he was satisfied that his testimony was correct and truthful, he gave counsel permission to alter any of his responses.

Counsel proceeded to make thirty-six changes, many of which materially altered the substance of Combs' testimony. Among the most striking changes were several reversals of Combs' answers to key questions: whether he believed that Rockwell or the UAW had intended to harm him financially or otherwise; whether a Rockwell employee knew about the seniority status of his fellow employees; whether the UAW purposefully breached its duty of fair representation; and whether his headaches were related to the way the UAW had treated him. Despite his sworn statement to the contrary, Combs never reviewed either the original or the altered deposition transcripts. A magistrate ordered Combs to give a second deposition, during which these material alterations were revealed.

Rockwell and the unions moved to dismiss Combs' action as the appropriate sanction for his misconduct. In the alternative, the defendants moved for summary judgment on the merits, claiming that Combs' suit was barred by the statute of limitations as well as by his failure to exhaust internal union remedies. The trial court dismissed the action with prejudice, pursuant to Fed. R. Civ. P. 11 and the court's inherent powers for violating Fed. R. Civ. P. 30(e).

[1] Dismissal is an appropriate sanction for falsifying a deposition. Fed. R. Civ. P. 11, as well as the court's inherent powers, can be called upon to redress such mendacity. *See Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988); *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985); *Professional Seminar Consultants v. Sino Am. Tech.*, 727 F.2d 1470, 1474 (9th Cir. 1984); *Wyle v. R. J. Reynolds Indus., Inc.*, 709 F.2d 585, 589, 591 (9th Cir. 1983); *Sigliano v. Mendoza*, 642 F.2d 309, 310 (9th Cir. 1981).

[2] Combs authorized counsel to alter his deposition in material respects. He signed the revised deposition and swore, under penalty of perjury, that he had reviewed the transcript and had himself made the changes. This conduct was in direct violation of Fed. R. Civ. P. 30(e), which states:

> When the testimony is fully transcribed the deposition shall be submitted to the witness for examination. . . . Any changes in form or substance which the witness desires to make shall be entered . . . with a statement of the reasons given by the witness for making them.

[3] Counsel's changes dealt with issues of central importance in the upcoming summary judgment hearing. Combs' belief that Rockwell and the UAW had intended to harm him was crucial to his claim, as was his alleged notice from coworkers of the alleged breach of the collective bargaining agreement. Combs, whether or not in collusion with counsel, thus attempted to deceive the district court on material matters before it. Falsifying evidence is grounds for the imposition of the sanction of dismissal. *See, e.g., Sino American,* 727 F.2d at 1473-74.

"There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. . . . But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976). *Cf. Malone v. U.S. Postal Service,* 833 F.2d 128, 130 (9th Cir. 1987), *cert. denied,* 488 U.S. 819 (1988) ("[W]e will overturn a dismissal sanction only if we have a definite and firm conviction that it was clearly outside the acceptable range of sanctions.").

[4] The mendacity of the client and the combined fraud and incompetence of his counsel are so egregious that there is no need to reach the merits of the motion for summary judgment. The case was properly dismissed.

[5] Combs' contentions on appeal are wholly without merit. Accordingly, we assess double costs and attorney's fees as

sanctions for filing a frivolous appeal. *See Kelley v. International Brotherhood of Elec. Workers*, 803 F.2d 516, 519 (9th Cir. 1986); *see also Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1052 (9th Cir. 1985) (imposing sanctions even where the trial court had already done so).

Counsel for Rockwell has calculated its attorney's fees in the amount of $11,250. Combs and his counsel are jointly and severally liable for costs and attorney's fees to be taxed upon presentation of cost bills by both defendants. This panel will retain jurisdiction to enter judgment upon the presentation of the cost bills.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLARENCE LEE ROY COMBS, Plaintiff, vs. ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation; AMALGAMATED LOCAL 887-UAW, an unincorporated labor union; INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), an unincorporated labor union, and DOES 1 through 100, inclusive, Defendants.	Case No. CV 88 03614 TJH (Bx) AMENDED ORDER ENTERED DEC 11, 1989

On October 30, 1989, this matter came on for hearing before the Honorable Terry J.

Hatter, Jr., presiding, on the Motion for Relief from Judgment or Order (FRCP 60) or, in the Alternative, Motion for Reconsideration of the Dismissal of Plaintiff's Lawsuit (Local Rule 7.16) filed by plaintiff Clarence Lee Roy Combs and on the Motion for Reconsideration of Order of September 18, 1989, filed by defendant Rockwell International Corporation, in which defendants United Auto Workers, Amalgamated Local 887; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) ("Union Defendants") had joined. Plaintiff Clarence Lee Roy Combs appeared and argued through his counsel, Mike Pincher. The Union Defendants appeared and argued through their counsel, Michael R. Feinberg of Schwartz, Steinsapir, Dohrmann & Sommers. The Court has read and considered the moving and responding papers, all supporting papers,

and the oral arguments of counsel.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff's Motion for Relief from Judgment or Order (FRCP 60) or, in the Alternative, Motion for Reconsideration of the Dismissal of Plaintiff's Lawsuit (Local Rule 7.16) is denied and the Union Defendants are entitled to Judgment as a matter of law;

2. Defendant Rockwell International Corporation's Motion for Reconsideration of the Court's Order of September 18, 1989, in which the Union Defendants had joined, is denied; and

3. This Court's "Revised Order and Judgment", submitted by the Union Defendants and previously entered on November 17, 1989, is hereby vacated and the instant Order is substituted in place and instead thereof.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLARENCE LEE ROY COMBS, Plaintiff, vs. ROCKWELL INTERNATIONAL CORPORATION, a Delaware corporation; AMALGAMATED LOCAL 887-UAW, an unincorporated labor union; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), an unincorporated labor union, and DOES 1 through 100, inclusive, Defendants.	) CASE NO. CV 88 03614 TJH (Bx)) ORDER ENTERED SEP 21 1989

On September 18, 1989, this matter came on for hearing before the Court, the Honorable Terry J. Hatter, Jr., presiding,

on Motion for Summary Judgment filed by Defendant ROCKWELL INTERNATIONAL CORPORATION. Plaintiff CLARENCE LEE ROY COMBS appeared and argued through his counsel, Mike Pincher. Defendant ROCKWELL INTERNATIONAL CORPORATION appeared and argued through its counsel, Jennifer A. Glazer and Paul, Hastings, Janofsky & Walker. The Court has read and considered the moving and responding papers and the oral arguments of counsel. The issue having been duly heard, decision is rendered in accordance with the Statement of Controverted Facts and Proposed Conclusions of Law filed herein."

" Although the court did not cross out this language in the order prepared by Rockwell, the merits were never reached because of the grounds for the dismissal and hence there was no Statement of Facts or

Conclusions of Law actually reached by the court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant's Motion for dismissal is granted;

2. Judgment is entered in favor of Defendant ROCKWELL INTERNATIONAL CORPORATION;

3. Plaintiff CLARENCE LEE ROY COMBS is to take nothing.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I live in the County of Los Angeles, State of California, and am over the age of 18 and not a party to the within action: my business address is 38530 159th Street East, Palmdale, Ca. 93550.

On July 3, 1991, I served the foregoing document described as: PETITION FOR WRIT OF CERTIORARI on the interested parties in this action by placing three true copies each thereof enclosed in a sealed envelope thereon fully prepaid in the United States mail at Palmdale, Ca., addressed as follows:

Michael R. Feinberg, Esq.
Schwartz, Steinsapir, Dohrmann & Sommers
3580 Wilshire Blvd., Suite 1820
Los Angeles, California 90010-2594
(213) 487-5700

Paul W. Cane, Jr., Esq.
Paul, Hastings, Janofsky & Walker
Twenty-Third Floor
555 South Flower
Los Angeles, California 90071
(213) 683-6000

I declare under penalty of perjury that the foregoing is true and correct and that I acted under the direction of the Petitioner acting pro se.

Executed July 3, 1991 at Palmdale, Ca.

Mike Pinchon

Signature